IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 6606 OF 2007

Kishore Kanungo & ors. .... Petitioner

versus

Paras Nagar Condominium & ors..... Respondent.

Mr. Niranjan Pandit with Viorat Rathod i/b M/s. Shah & Sanghvi for the petitioner.
Mr. Ramchandran i/b Narayan & Narayan for Respondents 1 to 4.

CORAM; A.P. DESHPANDE, J.
DATED; 07TH SEPTEMBER, 2007

P.C.;

1. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of parties.

2. This Writ Petition is filed by the original defendant taking an exception to an order passed by the City Civil Court, Bombay rejecting the Notice of Motion aimed at proving certain documents by leading evidence.

3. It is undisputed that right since beginning the advocates representing the respective parties were in agreement that there is no need to lead any evidence

and the matter would be argued, once the documents are filed and exhibited. This is evident from the ordersheet dated 15-2-2007. Thereafter both the parties filed compilation of documents. The defendants placed on record of the court below number of documents, some of which came to be admitted, hence exhibited. However, the documents which were not admitted came to be marked for the purpose of identification but not exhibited. At a later point of time, documents which were in the nature of public documents, its certified copies were filed on record and the same being admitted came to be exhibited. Few documents remained to be exhibited as plaintiff did not admit the same and are only marked for the purpose of identification. Ordersheet dated 5-4-2007 reveals that the docuemnts which were marked from Y to Y-15 for identification were to be exhibited in case the same are proved as per the provisions of the Evidence Act in the examination-in-chief. It is thus clear that the advocates were in know of the fact that barring proving the doucments filed by the respective parties, no other oral evidence was to be led and recorded. Nonetheless the parties so also the court was conscious of the fact that the documents which were not exhibited need to be proved and then exhibited. Ordersheet dated 12-6-2007 observes that the evidence of the plaintiff is closed and the

defendant was directed to file affidavit of evidence on 26-7-2007, obviously for proving the documents which were not exhibited. On 26-7-2007 a joint request was made by the advocates for the plaintiff and defendant to keep the matter for argument. This was obviously a mistake on the part of the advocate for the defendant. The advocate for the defendant carried an impression, which he gathered from the rozanama dated 15-2-2007, that no oral evidence is to be recorded. Barring the ordersheet dated 26-7-2007, the earlier ordersheets unequivocally indicate that some of the documents filed by the defendant were yet to be proved and hence there was a need for leading evidence by filing affidavit of examination in chief. Having realised the mistake, the petitioner took out the Notice of Motion, which has been rejected, giving rise to a cause to file this petition..

4. The learned counsel for the petitioner/defendant has submitted that but for a wrong statement made by the counsel to place the matter for arguments, there is nothing to justify the order rejecting Notice of Motion. It is submitted that though no oral evidence was and is necessry, nonetheless evidence was and is necessary to prove the documents and have them exhibited. It is then contended that for the mistake of advocate, the client should not be made to suffer.

It is also pointed out that if the impugned order passed by the trial court is not interfered with, the petitioner will suffer irreparable loss and undue hardship would be caused to him as material documents would not be taken into consideration, which in turn is bound to result in miscarriage of justice.

5. Per contra the learned counsel appearing for the respondent/plaintiff has supported the order passed by the City Civil Court. As pointed out hereinabove it is crystal clear from the earlier ordersheets that the understanding between the advocates was that there is no need to lead any oral evidence, however the documents need to be exhibited and the matter then to be fixed for arguments. The incorrect statement was made by the advocate for the defendant on 26-7-2007, obviously unmindful of the fact that some of the documents are yet to be exhibited and hence a need for filing of affidavit of evidence. It is obvious that the defendant wanted to prove the document by filing the affidavit of examination in chief, and the court had accepted the said request, which fact is evident from the ordersheet dated 12-6-2007. In this factual position the impugned order need to be interfered with so that miscarriage of justice can be avoided.

6. Perusal of the order passed by the Court below

reveals only two reasons for rejecting the motion. (i) As to why the defendant has not filed certified copies of the documents which are marked for the purpose of identification. The learned counsel points out that all the documents which are remained to be exhibited are not the public document of which certified copy could be obtained and filed on record. The documents which are to be proved not being public documents, the court is not justified in putting forth the said reason in that regard. The next ground is that the court will have to re-open the matter which was already fixed for argument. There is hardly any question of reopening of the matter as no oral evidence has been led and what is asked for by the defendant is permission to file affidavit of examination in chief with a view to prove the documents which are already placed on record at an appropriate stage. Thus the reasoning assinged by the City Civil Court in rejecting the Notice of Motion is not legal and proper and the order is bound to result in miscarriage of justice. The respondent can be compensated for the inconvenience caused to him. In the result the writ petition is allowed.

7. The impugned order is quashed and set aside. Notice of Motion is allowed. However, it shall be subject to the payment of costs of Rs. 5000/-.

Granting the joint request made by the learned counsel appearing for the respective parties I direct City Civil Court to decide the suit as expeditiously as possible and preferably within a period of six months from today.

Rule made absolute in above terms.

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